within a reasonable time, *In re Paine*—supra, and an estate cannot be re-opened to remove the bar of the statute of limitations provided in Sec. 11d of the Bankruptcy Act. *Kinder* v. Scharf—231 U.S. 517, 58 L. ed. 343, 34 S. Ct. 164—1913. Such a means for reaching unabandoned, unadministered property should, it is submitted, be exclusive.

If it were possible to show, in the principal case, that Parsons' trustee had notice of the claim against Whitehead's decedent, the case might be taken out of the category of cases in which the bankrupt may not "ordinarily bring suit" on a pre-bankruptcy claim.

ROBERT B. GOSLINE.

INJURY SUFFERED AS A RESULT OF VIOLATION OF HOURS OF LABOR STATUTE

The plaintiff in her petition alleged that she was sixteen years of age, as the defendant knew, and that she was employed by the defendant 12½ to 13½ hours per day, and 75 to 80 hours a week in violation of sections 12,996 of the Ohio General Code, which provided that no girl under eighteen should be employed more than eight hours in any one day nor more than forty-eight hours in any one week. Plaintiff further alleged that as a proximate result of defendant's violation of the statute, she became physically exhausted, suffered nervous breakdown, was forced to seek medical attention, was caused great embarrassment, and mental distress, and was damaged to the extent of $15,000. The trial court sustained a demurrer to her petition, which the Court of Appeals reversed. The Supreme Court, Zimmerman, J., dissenting, held that the demurrer was properly sustained. *Mabley & Carew Co.* v. *Lee, a minor*, 129 Ohio St. 69 (1934).

The majority opinion recognized that plaintiff was attempting to maintain an action at common law, but held that the constitutional provision relating to Workmen's Compensation barred any such action. They did not decide, nor was it necessary for them to do so, whether the plaintiff could recover anything under that act.

Article II, section 35, of the Ohio Constitution provides that laws may be passed for the purpose of providing compensation to workmen and their defendents for death, injuries, or occupational disease, occasioned in the course of employment and that such compensation shall be in lieu of all other rights to compensation, or damages for such death, injuries, or occupational disease.

It would seem that plaintiff could not have recovered in Workman's Compensation for death, injury, or occupational disease. She is alive. She has no occupational disease. *Industrial Commission of Ohio* v. *Roth*, 98 Ohio St. 34, 38, 120 N.E. 172, 173, 6 A.L.R. 1463, 1465, (1918, General Code section 1465-68A. Now has she suffered an injury as the term has been construed in the act? The court has repeatedly held that the injury must be traumatic. *Industrial Commission of Ohio* v. *Armacost*, 129 Ohio St. 176 (1935), (there is no such evidence (of trauma) in the case now before us); *Industrial Commission of Ohio* v. *Middleton*, 126 Ohio St. 212, 184 N.E.

835, (1935. Compare *Great Atlantic & Pacific Tea Company* v. *Sexton*, 242 Ky. 266, 46 S.W (2nd) 87 (1932). "The term injury as used in Ohio Workman's Compensation law comprehends only such injuries as are accidental in their origin and cause." *Industrial Commission of Ohio* v. *Granhen*, 126 Ohio St. 299, 185 N.E. 199, (1933).

But does the constitutional provision prohibit an action at common law? The majority argue that the provision was to benefit employers as well as employees. It is true that "open liability" is abolished, and that the employer is freed from the risk of extremely large damages for a compensible injury. It is another matter, however, to absolve the employer from common law liability for a wrong that is not compensible under the Compensation Act. Since the constitutional provision says that compensation shall be in lieu of all other compensation for such death, injury or occupational disease, it might easily be construed to mean only such injuries as are compensible. In line with the prevailing tendency to construe such clauses liberally in favor of employees, the construction would be justified.

It must be admitted that *Zajachuch* v. *The Willard Storage Battery Co.*, 106 Ohio St. 538, 140 N.E. 405, (1922), affords some support for the position of the majority, although the court did say there that it was not necessary to decide whether an action existed at common law. But the act has been held not to bar a common law action against a third person for the injury although both the employer and the third person were subscribers under the act, *Ohio Public Service Co.* v. *Sharkey, Amd'r*, 117 Ohio St. 584, 160 N.E. 687, (1928). Nor does it absolve a railroad company from liability under the Federal Employer's Liability Act for an injury to an employee of a construction company, hired by the defendant and required by the contract to comply with the state Workman's Compensation Law, *Erie R. Co.* v. *Margue* 28 Fed. (2nd) 644, (1928).

If the constitutional provision was construed so as not to bar an action at Common law in this situation the question would remain, "Does the plaintiff's petition state a cause of action at common law?"

The hours of labor statute was obviously passed for the protection of people in the class of the plaintiff. In fact, the constiutionality of such statutes have been upheld on this ground. *Miller* v. *Wilson* 236 U.S. 373, 35 S. Ct. 342, (1915). The Ohio Supreme Court has held on numerous occasions that violations of statutes and ordinances, intended for the protection of the plaintiff constitute negligence per se. Violating a speed law passed for protection of the public is negligence per se, *Schell* v. *Du Bois, Adm'r.*, 94 Ohio St. 93, 113 N.E. 664, (1916), employment of minor at every wheel in violation of statute held negligence per se, *Hadfield-Penfield Steel Co.* v. *Sheller*, 108, Ohio St. 106, 141 N.E. 89 (1923), Railure of a mine operator to keep a mine free of gas is violation of statute held to be negligence per se, *Krause* v. *Morgan*, 53 Ohio St. 26, 40 N.E. 886, (1895), Failure to insulate high tension wires in violation of staute held negligence per se, *Arnold* v. *Ohio Gas and Electric Co.*, 240 A. 435, 15 N.E. 828, (1928), and employment of minor in violation of Child Labor Statute, held to be negligence per se, *Steel Car Forge Co.* v. *Ohio*, 184 F. 868 (1911). See section 286, Restatement of the Law of Torts.

Violation of hours of labor statute has been held to be negligence per se.

Thus in *Inland Steel Co.* v. *Yednach*, 172 Ind. 423, 87 N.E. 229, (1909), under an act prohibiting the employment in a manufacturing establishment of persons under sixteen for more than sixty hours in a week or ten hours in a day, it was held negligence per se for a steel company, to employ a boy within the prohibited age, and require him to work more than the maximum number of hours and the boy fell asleep near the furnace track because of exhaustion from working more than the statutory number of hours, and was injured by an ore car run at an unusual time.

Even if we recognized that defendant was negligent the plaintiff, could not recover without proof of injury. The law does not recognize mental pain as sufficient to maintain an action for negligence in the ordinary situation. The obligations of great embarrassment and mental distress in the petition, standing alone, would not support a cause of action. But does the allegation of a nervous breakdown fall into the same classification? Many early cases denied recovery against a negligent defendant, to a plaintiff, who has suffered a nervous breakdown, parlysis, insanity or miscarriage. *Victorian Railways Commission* v. *Coultas*, 13 App. Cas. 222 (1888), *Mitchell* v. *Rochester Ry.*, 151 N.Y 107, N.E. (1896), *Erving* v. *Pittsburgh C. C. & St. Louis Ry.*, 147 Penn. 40, 23 A. 438, (1892). Decisions were placed on various grounds; (1) lack of precedent, (2) no recovery for mental injury; (3) no recovery for fright, and therefore none for the results of fright; (4) lack of proximate cause. None of these arguments affords a sufficient justification for the result. If there had been no precedent there soon were many More satisfactory medical knowledge showed that injuries were physical and not mental. Recovery was denied for fright on the ground that it was mental and beneath notice, but when physical injuries were established, the argument did not apply The result was frequently direct and causation abundantly established. Many courts recognized the justice of the plaintiff's case and held from the beginning that plaintiff could recover. *Purcell* v. *St. Paul Ry.*, 48 Minn. 134, 50 N.W 1034, (1892), *Hill* v. *Kimball*, 76 Texas 210; 13 S.W 59 (1890), *Mach* v. *South Bound R. Co.* 52 S. C. 323, 29 S.E. 905 (1898).

Some of the courts which just denied recovery soon reversed their position. Thus England has long recognized that plaintiff might maintain an action. *DuLieu* v. *White & Sons* (1901) 2K.13.669. Other courts denied recovery on the ground of expediency alone, arguing that such injuries might easily be feigned. *Spade* v. *Lynn* v. *B. R. Co.*, 168 Mass. 285, 47 N.E. 88, (1897). This offers the only plausible ground for the defendant and few cases in recent years have attempted to justify a denial of recovery on any other reason. *Cornstoch* v. *Wilson*, 257 N.Y. 231, 177 N.E. 431, (1931). The view permitting recovery has been steadily gaining ground and has now been accepted in a majority of jurisdictions. See Hallen, *Hill* v. *Kimball, A Milepost in the Law*, 12 Texas Law Review 1. (1933).

The Ohio Supreme Court, in the case of *Miller* v. *Baltimore & O. S.W. R. Co.* 78 Ohio St. 309, 85 N.E. 499, (1908) denied recovery against a negligent defendant. Reexamination of the doctrines denying recovery without impact in other jurisdictions has frequently led to its rejection as a serious limitation upon it. Unless the doctrine is limited, it would prove a decided obstacle to plaintiff's attempt to base an action here upon any theory of negligence.

The majority's decision that the Workman's Compensation Act was exclusive, made it unnecessary for them to discuss any other points. It is submitted that the able dissenting opinion of Judge Zimmerman is the sounder. It would seem that the Workman's Compensation Act should be construed so as to exclude wrongs that are not compensible under the act, and that if the defendant violated the hours of labor statute, it was negligent to the plaintiff. While plaintiff might have difficulty in establishing any physical injury at the trial, it would seem that the allegation of a nervous breakdown should be regarded as sufficient against a demurrer.

SEYMOUR A. TRETELMAN.